Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue

1. Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16
2. Cornwall v Allianz Australia Insurance Limited [2022] NSWSC 541
3. Boga v AAI Limited trading as AAMI [2022] NSWSC 560
4. Fairfield City Council v McCall [20220 NSWPICPD 15

High Court of Australia Decisions

Federal diversity jurisdiction – Tribunal dismissed complaint for want of jurisdiction without addressing the merits of the defence – Full Supreme Court of Tasmania considered the merits of, and rejected, the defence of inconsistency with federal law – Held: While the Tribunal is not "a court of a State" within meaning of ss 77(ii) and 77(iii) of Constitution, it has jurisdiction to decide the limits of its own jurisdiction to hear and determine a complaint

Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16 - KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ – 4/05/2022

The High Court held that a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution judicial power with respect to any matter of a description in s 75 or s 76 of the Constitution. To ensure validity, a State law conferring State jurisdiction of a State tribunal must therefore be construed in accordance with applicable State legislation to exclude jurisdiction with respect to all such matters.

In *Burns v Corbett* (2018) 265 CLR 304, State jurisdiction was found to have been denied to a State tribunal in a matter, referred to in s 75(iv) of the Constitution, between residents of different States. A matter meets the description of a matter between residents of different States if the parties to the justiciable controversy which comprises the matter are natural persons who are in fact resident in different States.

Following *Burns*, this appeal concerned the exclusion from State jurisdiction conferred on a State tribunal of matters, referred to in s 76(i) or s 76(ii) of the Constitution, arising under the Constitution or arising under laws made by the Commonwealth Parliament. How is a justiciable controversy to be identified as a matter answering one or other of those descriptions?

Finding the constitutional defence to be "*not colourable*", the Tribunal ordered that the complaint be dismissed for want of jurisdiction .

On appeal, the Full Supreme Court of Tasmania , the Full Court (Blow CJ, Wood and Estcourt JJ) addressed the merits of the constitutional defence and unanimously rejected it. The Court set aside the order of the Tribunal and remitted the complaint to the Tribunal for hearing and determination. Blow CJ (with whom Wood J agreed) described the argument that the State Act is inconsistent with the Commonwealth Act and the Commonwealth Standards as "*misconceived*". However, the Court did not clearly identify what it saw as the appealable error on the part of the Tribunal.

The appellant appealed to the High Court and the Court allowed the appeal, set aside the decision of the Full Court and dismissed the appeal from the Tribunal to the Full Court. The Court's reasons are summarised below.

- One possible interpretation of the several reasons for judgment is that the Full Court found the Tribunal to have erred by failing itself to address and reject the merits of the constitutional defence in the exercise of the State jurisdiction to hear and determine the complaint conferred on it by the State Act. Another possible interpretation is that the Full Court held that the Tribunal erred by failing to conclude that raising the constitutional defence did not exclude State jurisdiction to hear and determine the complaint because the constitutional defence was not "*reasonably arguable*" in the sense that the constitutional defence would have amounted to an abuse of process if raised in a court.
- It was not necessary to subject the Full Court's reasons to further examination because it would have been wrong to discern appealable error on the part of the Tribunal on either of those bases. It is also not necessary for the Court, exercising appellate jurisdiction under s 73(ii) of the Constitution, to give the judgment which ought to have been given by the Full Court , itself to examine and determine the merits of the argument that the State Act is in relevant part inoperative because it is inconsistent with the Commonwealth Act and the Commonwealth Standards.
- The constitutional defence was genuinely raised in answer to the complaint in the Tribunal and it was not incapable on its face of legal argument. That being so, the complaint and the defence together formed parts of a single justiciable controversy comprising a matter within the description in each of s 76(i) and s 76(ii) of the Constitution. The Tribunal was on that basis correct to order that the complaint be dismissed for want of jurisdiction.
- The Tribunal has State power to determine the limits of its State jurisdiction, but some explication of underlying principle is warranted, as follows:

> 18. The starting point is the constitutional precept that "*all power of government is limited by law*" and that "*[w]ithin the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies*" .
>
> 19. The limits of a power conferred by statute are those expressed in or implied into the statute construed in light of the Constitution. That is so whether the repository of the power is a court or a non-court tribunal and whether the power conferred is judicial or non-judicial.
>
> 20. Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by Commonwealth legislation is amenable to compulsion or restraint by mandamus or prohibition granted in the entrenched original jurisdiction of this Court under s 75(v) of the Constitution . Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by State legislation is correspondingly amenable to compulsion or restraint by an appropriate judicial remedy granted in the entrenched supervisory jurisdiction of the Supreme Court of that State .
>
> 21. Having a judicially enforceable duty to comply with the limits of its own jurisdiction, a court or a non-court tribunal must have power to take steps needed to ensure its own compliance with that duty. If not expressed in the legislation establishing the court or non-court tribunal or in the legislation conferring jurisdiction on it, that power is necessarily implied on the basis that "*everything which is incidental to the main purpose of a power is contained within the power itself*".
>
> 22. The power which a court or a non-court tribunal necessarily has to ensure that it remains within the limits of its jurisdiction is not of a nature that is inherently judicial. The reason is that the exercise of the power is incapable of quelling a controversy between parties about existing legal rights . Nor is it inherently non judicial. Rather, the power takes its nature from the nature of the power to which it is incidental: "*[t]he nature of the final act determines the nature of the previous inquiry*" .

23. A court in which judicial power is invested therefore "*has jurisdiction to determine – and to determine judicially – whether it has the jurisdiction to entertain a particular application or to make a particular order*". The court, in other words, has "*jurisdiction to decide its own jurisdiction*" in the performance of which it exercises judicial power.

24. A tribunal that is not a court and that is invested with non-judicial power correspondingly has authority – in the exercise of non-judicial power – to "*make up its mind*" or "'*decide*' *in the sense of forming an opinion*" about the limits of its own jurisdiction "*for the purpose of determining its own action*" . The authority is not to "*reach a conclusion having legal effect*" but to form an opinion for the purpose of "*moulding its conduct to accord with the law*".

25. The jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution on which State judicial power is conferred by State legislation is to be understood in conformity with the same principles. The State tribunal must be taken to have incidental jurisdiction to determine whether the hearing and determination of a particular claim or complaint would be within the legislated limits of its State jurisdiction. The Federal Court and the Court of Appeal of the Supreme Court of New South Wales have correctly so held.

26. Taking its nature from the nature of the power to which it is incidental, that jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution is itself a conferral of State judicial power. Accordingly, the State tribunal exercises judicial power when it decides that a claim or complaint in respect of which its jurisdiction is sought to be invoked is or is not a matter of a description referred to in s 75 or s 76 of the Constitution. The Federal Court has correctly so held. To the extent that the Court of Appeal of the Supreme Court of New South Wales might be understood to have held to the contrary in *Sunol v Collier*, that decision should not be followed.

27. The legal effect of the judicial exercise by a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution of its jurisdiction to decide its own jurisdiction is no different from the legal effect of the judicial exercise of jurisdiction to decide its own jurisdiction by an inferior court of the State that is a court within the meaning of s 77(ii) and s 77(iii) of the Constitution. The limits of jurisdiction are in each case the limits that are set by the legislated conferral of jurisdiction construed in light of the Constitution. The judicial determination of jurisdiction is in neither case conclusive . In either case, if jurisdiction is wrongly determined to exist, such order as is ultimately made in the purported exercise of jurisdiction is wholly lacking in legal force .

28. Here, the opinion formed by the Tribunal that the complaint referred to it was beyond its jurisdiction to hear and determine was accordingly a judicial opinion and the order made by the Tribunal dismissing the complaint for want of jurisdiction was an order made in the exercise of State judicial power. The question for the Full Court on appeal from the order of the Tribunal was, and the question for this Court on appeal from the judgment of the Full Court is, whether that order was correct.

- The Court held that the relevant limit on the jurisdiction of the Tribunal to hear and determine the complaint arises because of the provisions of the State Act which confer that jurisdiction are to be construed in accordance with the applicable State interpretation legislation to exclude jurisdiction with respect to any matter meeting a description in s 75 or s 76 of the Constitution.

30. The existence and scope of a matter meeting a description in s 75 or s 76 of the Constitution must be determined by "*objective assessment*" . The assessment to be undertaken to determine the existence and scope of a matter excluded from the State jurisdiction conferred on a non-court State tribunal by a State law is no different from the assessment to be undertaken to determine the existence and scope of a matter of the same description within the jurisdiction of this Court by s 75 or under s 76, conferred on a court created by the Commonwealth Parliament under s 77(i), or invested in a court of a State under s 77(iii) of the Constitution. Moreover, the objective assessment can be no

different when undertaken by a non-court State tribunal for the purpose of determining whether a particular claim or complaint is within the legislated limits of its State jurisdiction from when the assessment is undertaken by the Supreme Court of the State on appeal or in the exercise of its entrenched supervisory jurisdiction…

33. … the subject-matter of the complaint referred to the Tribunal was a justiciable controversy about the entitlement of the respondent to an order under the State Act on the basis that the appellants discriminated on the ground of disability in the provision of a facility by failing to provide adequate wheelchair access in the construction of Parliament Square in Hobart. The assertion by the appellants by way of defence to the complaint that the State Act is in relevant part inoperative by force of s 109 of the Constitution by reason of inconsistency with the Commonwealth Act and the Commonwealth Standards formed part of the one justiciable controversy for the reason that the determination of the constitutional defence was essential to the determination of the claim . That was so notwithstanding the incapacity of the Tribunal judicially to determine the constitutional defence in the exercise of the limited jurisdiction conferred by the State Act . The totality of that single justiciable controversy was therefore one matter meeting the descriptions in both s 76(i) and s 76(ii) of the Constitution. Having attracted that character by the raising of the constitutional defence, the single justiciable controversy encompassing both the statutory claim and the constitutional defence would retain that character even if the constitutional defence were later to be considered and rejected by the Supreme Court.

The Court stated that for a claim or defence in reliance on a Commonwealth law or in reliance on the Constitution to give rise to a matter of a description in s 76(1) or s 76(ii) of the Constitution, it is enough that the claim or defence be genuinely in controversy and that it give rise to an issue capable of judicial determination.

In other words, it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument. Examination of what the prospects of success of a legally coherent claim or defence might be, were it to be judicially determined on its merits, forms no part of the requisite assessment.

Supreme Court of NSW Decisions

Judicial Review – s 62 MACA 1999 – Application for further assessment – whether further medical reports were considered "additional relevant information" – whether further medical opinions were capable of having a material effect on the outcome of the previous assessment – Proper Officer's decision upheld

Cornwall v Allianz Australia Insurance Limited [2022] NSWSC 541 – Harrison AsJ – 5/05/2022

On 3/01/2015, the plaintiff suffered injuries in a MVA, when he was rear-ended twice. On 15/01/2015, he lodged a claim for assessment of permanent impairment and on 10/03/2017, he lodged an application for assessment of a permanent impairment dispute by the MAS.

The plaintiff had a history of back complaints before the MAS assessment. On 11/09/2017, Dr Home assessed the plaintiff and on 14/09/2017, he issued a MAC, which diagnosed soft tissue injuries of the cervical and lumbar spines, the latter secondary to right L5/S1 disc protrusion compressing the right S1 nerve root, disc dehydration and sciatica and paraesthesia of the right leg and foot. He assessed 25% WPI caused by the MVA.

On 24/09/2017, the insurer applied for review of the MAC and the proper officer of SIRA decided that there was reasonable cause to suspect a material error in the assessment and referred the matter to an Appeal Panel for review.

On 25/01/2018, following a teleconference, the review panel contacted the plaintiff and requested further information, namely: clinical records of Dr Pope, any treating rheumatologists and any treating neurosurgeons, before and after the MVA. In response, the plaintiff's solicitor provided clinical records of Dr Pope and Dr Al Muderis.

On 26/04/2018, the Appeal Panel revoked the MAC and issued a fresh MAC, which found that the plaintiff had suffered 0% WPI as a result of the MVA.

On 28/03/2019, the Appeal Panel's MAC was set aside by Schmidt J: *Cornwall v Allianz* [2019] NSWSC 324. Her Honour stated, relevantly:

> [47] It follows that Mr Cornwall's case, that the Panel erred in its assessment of the accident circumstances, must be accepted. The Panel was obliged by Guideline 1.9 to consider whether the second collision, which ended with him falling to the ground, was more than a negligible contributing cause of the impairment of his lumbar spine. This it failed to do. …
>
> [60] In coming to its own opinions, the Panel had to consider all of these matters, as well as Assessor Home's opinions and the reasons on which they were based It also had to disclose the actual path of reasoning by which it arrived at its finally different conclusion.
>
> [61] This, I am satisfied, it failed to do. …
>
> [72] To the contrary, having concluded that the accident had caused the injuries which the Panel identified, it was not open to it to proceed on the basis that they were simply "not relevant" to its assessment of whether those injuries had contributed to the impairment of Mr Cornwall's spine. After all, that was the issue which it was called upon to resolve.
>
> [73] Nor was the level of Mr Cornwall's impairment caused by his pre-existing injuries, that is the impairment he was suffering before the collisions, or any impairment caused by the surgeries which he had to have after the collisions, only of "academic interest", as the insurer also contended. They were rather both a part of what the Review Panel necessarily had to consider, in accordance with Guideline 1.35, in resolving whether or not the collisions had also contributed to Mr Cornwall's impairment, by more than a negligible amount.

The dispute was remitted to the Proper Officer for determination according to law.

On 5/08/2018, the second Appeal Panel issued a further MAC and again assessed 0% WPI as a result of the MVA.

On 7/10/2020, the plaintiff made an application for a further assessment under s 62(1)(a) *MACA*. He relied on reports from Dr Darwish dated 5/03/2020 and 14/07/2020, reports of Dr Giblin dated 31/03/2020 and 12/05/2020, reports of Dr Parkinson dated 17/07/2020 and a report from Ben Reidy dated 5/05/2020.

On 15/02/2021, the Proper Officer refused the application for further assessment.

The Proper Officer held that the reports of Dr Darwish and Dr Giblin were not additional relevant information such as to be capable of having a material effect on the assessment of the lumbar spine injury, and stated, relevantly:

> [28] It is clear from the reasoning of the Panel that one of the significant factors leading to its conclusion that the subject accident was not a cause of "right-sided SI radiculopathy due to L5-S1 disc prolapse requiring lumbar spine decompression and later, lumbar fusion" was the claimant's pre-existing symptomatic low back pain and the fact that leg pain did not develop until four weeks after the accident. There appears to be nothing in the reports from Dr Darwish that I consider such as to be capable of having any effect on the outcome of that assessment.

The Proper officer noted that while the doctors attributed the need for surgery to the MVA, this opinion had clearly been put to the Panel for consideration via prior reports. The doctors appeared to provide little reasoning in the supplementary reports to support his conclusion and it is not evident that their conclusion was based on any findings, history or the like which differ to those that previously expressed and considered by the Panel or which would add to the cogency of reasons supporting this view.

In relation to Dr Parkinson's opinion, which "strongly suggested" a causative connection based on "the temporal association between the accident and symptom development", the Proper Officer noted that the doctor was asked to assume that there was an aggravation of low back pain and upper gluteal pain within days of the MVA. The Proper Officer stated:

[42] I consider that this assumption, which appears to underpin Dr Parkinson's opinion, is at odds with the claimant's report to the Panel that the right leg pain extending into the buttock did not develop until four weeks after the accident, when he awoke with such pain after no specific incident.

[43] Again, whilst I note that Dr Parkinson opines in this report that the subject accident responded in L5/S1 disc herniation, this was an opinion that was put to the Panel in various medical reports and was an issue which was addressed by the Panel at length in their reasoning.

[44] It is also not evident to me from the face of the report or the submissions, that the report has the capacity to effect the Panel's finding that the soft tissue injury to the lumbar spine, which they found had been caused by the accident, had resolved.

[45] I am not satisfied that the report from Dr Parkinson is additional relevant information such as to be capable of having a material effect on the assessment of the lumbar spine injury.

The Proper Officer stated that Dr Reidy did not suggest the cause of the pathology indicated in his radiological report and they were not satisfied that this was capable of having a material effect on the outcome of the previous assessment.

The plaintiff applied to the Supreme Court of NSW for judicial review of the Proper Officer's decision on the following grounds:

(1) The Proper Officer committed an error of law on the face of the record in that she: (a) construed the requirement in s 64 *MACA* relating to the expression "additional *relevant information*" incorrectly and contrary to the Court of Appeal's decision in *Chan* because Dr Darwish and Dr Giblin's opinions were additional; (b) failed to recognise Dr Darwish provided 2 additional pieces of relevant information: (i) Symptoms developed after the motor accident; and (ii) 95% of the plaintiff's symptoms and impairment were due to the accident; (c) failed to give reasons: (i) For not considering the information in [(b)(i)] above additional relevant information; and (ii) For not considering the information in [(b)(n)] above additional relevant information; (d) By applying the wrong test of materiality, namely embarking upon an analysis to determine whether the additional information would as opposed to could lead to a relevantly different outcome; and (e) In failing to engage with the difference between the oral history and the clinical picture; and

(2) The Proper Officer committed jurisdictional error: (a) By failing to determine that Dr Darwish and Dr Giblin's opinions were additional and relevant information and enlivened the Proper Officer's power to refer the matter for further assessment; (b) By engaging in a process of determining what weight to give to the additional information; (c) By failing to consider whether Dr Darwish's report was capable of having a material effect on the outcome of the previous assessment; and (d) By failing to consider whether Dr Giblin's report was capable of having a material effect on the outcome of the previous assessment.

Harrison AsJ dismissed the Summons and held that the plaintiff had failed to establish error on the face of the record or jurisdictional error. Her Honour's reasons are summarised below.

- The plaintiff's challenge involved the consideration of one issue, namely whether the Proper Officer incorrectly exercised her discretion under s 62(1) *MACA* in refusing the application for further assessment.
- The leading authority with regards to s 62(1) and s 62(1A) *MACA* is the recent Court of Appeal decision in *Chan*, which held that the threshold question for the Proper Officer is whether the additional reports are such as to be capable of having a material effect on the outcome of the previous assessment. Only if she formed the opinion that they were, was the prohibition in s 62(1A) *MACA* inapplicable. If she did form that opinion, then it would be necessary to exercise a discretion under s 62(1) *MACA*.

- The prohibition in s 62(1A) *MACA* turns on whether the Proper Officer has formed an '*opinion*' as to whether the additional information is such as to be capable of having a material effect on the outcome of the previous assessment. It is established that in respect of s 62(1A) *MACA*, despite the absence of any explicit reference to the opinion of the Proper Officer, as opposed to the fact that the additional relevant information is capable of having a material effect on the outcome of the previous assessment, that nonetheless the prohibition in s 62(1A) *MACA* turns on the Proper Officer's opinion: See *Jubb* at [33] where Gleeson JA collects the authorities regarding this principle.
- Whether or not additional relevant information is capable of having a material effect on the outcome of a previous assessment depends upon the reasons for the previous assessment and the nature of the additional information. This is a question of fact.
- The task for the Court on review is confined to whether the opinion has been properly formed according to law. The issue is not whether the Proper Officer was right or wrong to hold the opinion: See *Chan* at [28]. The issue is whether the opinion has been shown to be vitiated on administrative law grounds. That might be because it is based on a misconstruction of the legislation, because it paid regard to something that is prohibited by statute, or because it was "*irrational, illogical and not based on findings or inferences of fact supported by logical grounds*": See *QBE Insurance v Miller* [2013] NSWCA 442 at [36]. With regards to the reasons of the Proper Officer, it is to be borne in mind that the Proper Officer is not necessarily as qualified as a legal practitioner or a medical practitioner, and the brief written reasons which accompany the decision are not to be construed as if they were reasons for the judgment of a court: See *Chan* at [29].
- There would be judicially reviewable error if the Proper Officer had merely confined her inquiry to whether the reports were not based on new findings or information not available to the previous assessors. In accordance with the decision of *Jubb*, the additional reports are not precluded from being considered 'additional new information' for the purposes of s 62 simply because the issues discussed in the reports were alive at the previous assessment.
- As stated above, that is not the question posed by s 62(1A). However, in my view, that is not what she did. The Proper Officer went further and asked precisely the question posed by statute – were the new reports capable of having a material effect on the outcome of the previous assessment?
- In answering this question, the Proper Officer firstly summarised the evidentiary documentation that was before the second Appeal Panel. She then summarised the reasoning of the second Appeal Panel at [22] of her decision, stating that the second Appeal Panel concluded that the plaintiff sustained a soft tissue injury of the lower back from the motor accident, the effects of which had resolved and that the accident was not a cause of the right-sided SI radiculopathy due to L5-S1 disc prolapse requiring lumbar spine decompression and later, lumbar fusion. She further stated at [23] that symptoms of persisting lower back pain after the accident were similar to those which had preceded the accident. The Proper Officer identified that a significant factor in the second Appeal Panel's theory of causation was the finding that there was no clinical evidence of right lower limb symptoms until four weeks after the accident.
- It is clear that lack of contemporaneous documentation of complaints regarding the right lower limb until four weeks after the accident was a significant factor in the second Appeal Panel's determination that the injuries sustained by the plaintiff were not caused by the motor vehicle accident. While the additional reports of Dr Darwish, Dr Giblin and Dr Parkinson do provide further support to the theory of causation put forward by the plaintiff, the information referred to by these additional reports, notably the physiotherapist report of Ms Crapp, had already been before the second Appeal Panel.

- Furthermore, the additional reports did not substantiate any arguments dispensing the second Appeal Panel's theory of causation involving the lack of contemporaneous complaints regarding the plaintiff's right lower limb during the four-week period after the accident. In my view, it was open to the Proper Officer to form the opinion that the additional material adduced was not capable of materially affecting the decision of the second Appeal Panel.

Her Honour concluded that the Proper Officer applied the correct statutory test set out in s 62 *MACA* and described in Chan and se did not overstep her jurisdictional limit when doing so.

Judicial Review – MVA – permanent impairment dispute – additional surveillance footage and medical reports provided – Held: Delegate failed to exercise the residual discretion under s 62 MACA – jurisdictional error found

Boga v AAI Limited trading as AAMI [2022] NSWSC 560 – Dhanji J -12/05/2022

On 13/07/2016, the plaintiff was injured in a MVA, which occurred when he was sitting in a stationery vehicle that was struck from behind and his vehicle then collided with the vehicle in front. Liability was not disputed.

The plaintiff claimed damages for non-economic loss, which required an assessment of greater than 10% WPI as a result of the injury caused by the MVA. The defendant disputed this.

On 1/05/2018, Professor Fearnside issued a MAC which assessed 19% WPI with respect to injuries to the spine and shoulders. However, he stated that a left knee injury had not yet stabilised and that this was beyond his area of expertise.

On 31/10/2018, Dr Wilding issued a MAC which assessed 0% WPU with respect to the left knee.

On 19/07/2019, the first defendant's application for a further medical assessment was considered by a Proper Officer of the MAS and directed that there should be a further assessment of the injuries considered by Prof. Fearnside. This was referred to Dr Wilding and on 9/09/2019, he issued a MAC that assessed 12% WPI.

On 16/10/2019, the first defendant lodged an application for review of Dr Wilding's medical assessment under s 63 *MACA* and the plaintiff lodged a reply on 15/11/2019.

On 16/12/2019, a Proper Officer of the MAS was not satisfied that there was reasonable cause to suspect that Dr Wilding's medical assessment was incorrect in a material respect and rejected the application for review.

On 15/01/2020, the first defendant asked the Proper Officer to review the decision, but this was declined on 17/03/2020 on the basis that the Proper Officer had no power to do so.

The plaintiff applied to the Supreme Court for judicial review and sought orders quashing Dr Wilding's MAC dated 9/09/2019, and the 2 decisions of the Proper Officer. On 24/12/2020, Cavanagh J dismissed the Summons with costs: *AAI Limited (t/a AAMI) v Boga* [2020] NSWSC 1903; 95 MVR 17.

On 5/07/2021, a Proper Officer of the MAS determined that the matter should be referred for a further medical assessment as there is "*additional relevant information or deterioration of the injury such as to be capable of having a material effect on the outcome of the previous assessment*".

The plaintiff applied for judicial review of that decision and alleged that the Proper Officer erred as follows: (1) by misdirecting herself with respect to the requirements of s.62(1A) *MACA;* (2) in concluding that the reports of Drs Harvey and Menogue were: (i) additional relevant information; and (ii) capable of having a material effect on the previous assessment; (3) in concluding that the information in the reports of Drs Harvey and Minogue [sic] was additional relevant information about "*the injury*"; (4) failing to properly consider the surveillance material by viewing it for herself; (5) by failing to take into account and exercise the residual discretion given by s.62(1) *MACA,* to determine whether to refer the matter for further assessment; (6) in so far as they exercised the residual discretion, she failed to give reasons for the exercise of the discretion adverse to the plaintiff; and (7) by failing to take into account and consider the plaintiff's express submission that the matter should not be referred for further assessment as to do so would [be] contrary to the objects of the Act and the MAS.

Justice Dhanji noted that the "*further medical information*" relied upon by the Proper Officer comprised (1) a Procare surveillance report dated 16/05/2019 and associated DVD; (2) a Verifact surveillance report dated 1/03/2020 and associated DVD; (3) Reports of Dr Harvey dated 2/01/2020, 23/03/2020 and 29/07/2020; and (4) Reports of Dr Menogue dated 11/01/2020 and 28/04/2020.

His Honour rejected grounds (1) and (4) and held that he was not satisfied that the plaintiff had established these grounds. He stated, relevantly:

> 64 While I am of the view the factual basis for the plaintiff's complaint is not established, I note that, in *Asaner*, while his Honour did not need to decide the matter, Campbell J observed (at [21]) that in his view "*it may not be necessary in every case for [the delegate] to view a DVD to make his or her own independent decision whether to refer the dispute for a further medical assessment*". His Honour went on to note that *"[e]xcept… in what is likely to be, rare cases where the capacity to change the outcome of the previous assessment is self-evident from a consideration of the lay material itself a proper officer may permissibly form the view that what the doctor says of the surveillance is more significant to the task than his or her own necessarily lay impression"*. While I, similarly, do not need to decide the issue, I note my agreement with his Honour's observations.
>
> 65 Additionally, I am of the view that there is no substance to the complaint that the delegate erred in having regard to the doctors' opinions which were in part based on the Procare surveillance. It is convenient, at this point, to further consider the meaning of the expression "*additional relevant information*", which begs the question: additional as to whom, as to when or as to what? As noted above, the delegate, did not regard the Procare material as additional because it predated Dr Wilding's assessment. This was to, in effect treat "additional" as meaning additional based on the time of the relevant assessment, or possibly, based on the plaintiff's submission to the delegate, as additional as to content or issue. These approaches are not correct. In *Jubb v Insurance Australia Ltd* [2016] NSWCA 153; 76 MVR 228, Gleeson JA observed (at [60]):
>
> > … The ordinary meaning of the word "*additional*" is "*supplementary*". In the context of s 62(1)(a) and subs (1A), the phrase "*additional relevant information*", as used in s 62, refers to information which is additional to that which was before the medical assessor when the previous medical assessment was carried out: *Miles v Motor Accident Authority of NSW* [2013] NSWSC 927 (Miles) at [34] (Hoeben CJ at CL). That the information relied on as being "*additional*", relates to the "*same issue*" as considered by the previous medical assessor, is not inconsistent with the ordinary meaning of "*additional*" when used in the phrase "*additional relevant information*". As Hoeben CJ at CL observed in *Miles* (at [34]):
> >
> > > The comparison is between information which was before the medical assessor when the previous medical assessment took place and information which is additional to that which is of such a character that it is capable of changing the outcome of the previous medical assessment if it were placed before the medical assessor.
>
> 66 The reference in *Miles v Motor Accident Authority of New South Wales* (2013) 84 NSWLR 632; [2013] NSWSC 927 to the material being of "*such a character that it is capable of changing the outcome*" reflects Hoeben CJ at CL's consideration of the expression "*additional relevant information*" as used in s 62(1) in the context of the whole of s 62. The meaning of "*additional relevant information*" in isolation was made plain at [36], where his Honour said:
>
> > It follows that the clear and obvious meaning of the phrase "*additional relevant information*" as used in s62 is information which is additional to that which was before the medical assessor when the previous medical assessment was carried out.
>
> 67 There was, therefore, no basis to exclude the Procare material simply based on its timing, or the fact that it may have dealt with an issue previously considered. Thus, even if the delegate considered the doctors' opinion with respect to the Procare material, it did not follow that the delegate was in error, as the Procare material is capable of falling within the meaning of

"*additional relevant information*". Further, even if the Procare material was not additional relevant information, it does not follow that a doctor's opinion as to that material would not be additional relevant information. That is sufficient to dispose of this complaint.

68 Before leaving this ground, I would however add, that it is not at all clear that the delegate did have regard to the doctors' opinions with respect to the Procare material. As set out above, Dr Harvey provided separate reports dealing with the significance of the Procare and Verifact evidence respectively. While Dr Menogue's report of 28 April 2020 dealt with both lots of surveillance, the report provided an opinion that the Verifact surveillance material specifically was consistent in "*demonstrating no evidence of functional impairment*". This was, consequently, capable of being separately considered by the delegate. Paragraph [9] of the delegate's reasons, while unclear, is at least consistent with a consideration of the doctor's opinions with respect to the Verifact footage alone.

His Honour rejected grounds (2) and (3), which complained of error in the delegate's conclusion that the reports of Dr Harvey and Dr Menogue were additional relevant information. He found that the delegate was not required to exclude the Procare material and the doctors' opinions based on it and he stated, relevantly:

76 For the reasons already given, I do not accept that the delegate was required to exclude the Procare material and the doctors' opinions based on the Procare material. It appears at least possible, however, that she did exclude it by not considering it "*additional*". This raises the question as to whether, if she did exclude it, she properly "*turn[ed] [her] mind to the original assessment and the reasons supporting that assessment" and "evaluate[d] the extent to which*" the doctors' opinions of the Verifact surveillance impacted on the earlier determination. That is, if she restricted herself to the Verifact material and opinions based on it (albeit wrongly), was her state of satisfaction properly reached?

77 The reasons, in stating (at [9]) that "*[t]he information casts doubt over the consistency of the claimant's presentation at the previous medical assessment and therefore calls into question the resulting whole person impairment*", suggest that the delegate answered the right question. Nor do I accept the plaintiff's claim that the doctors' opinions, based only on the Verifact material could not support the conclusion. The doctors were of the view that the Verifact surveillance was "*not compatible with the severe disability of which he complains*" (Dr Harvey, 23 March 2020) or was effective in "*again demonstrating no evidence of functional impairment*" (Dr Menogue, 28 April 2020). The fact that the doctors were of the view this was consistent with the earlier Procare surveillance does not alter the materiality of the Verifact material, or the doctors' opinions with respect to it. That is, the doctors' reports are capable of being understood as stating that the Verifact surveillance did not add anything to the Procare surveillance, and not that the Verifact surveillance did not add anything at all.

His Honour upheld grounds (5), (6) and (7). He stated that the delegate was required to take 3 steps before referring the matter for further assessment under s 62. She was required to be satisfied that: (1) there was "*additional relevant information about the injury*": s 62(1)(a); (2) that information was "*such as to be capable of having a material effect on the outcome of the previous assessment*": s 62(1A); and (3) her discretion to refer the matter should be exercised. However, the delegate's reasons gave no consideration to the discretion and she erred in failing to consider it and she constructively failed to exercise jurisdiction. His Honour stated:

91 The present case involved more than simply a failure to address an argument or submission relied on by the plaintiff: cf *Day v SAS Trustee Corporation* [2021] NSWCA 71 at [37], relied on by the first defendant in this matter. Rather, the issue here goes to the operation of the statutory provision. It is not necessary to decide whether, as the plaintiff contended, any case in which a delegate fails to address the discretion, will be one of jurisdictional error. It is sufficient for present purposes to observe that the issue of the discretion was before the delegate but was never addressed. In these circumstances, I am satisfied that jurisdictional error has been established.

Discretion

92 Although jurisdictional error has been established, this Court retains a discretion as to whether relief should be granted. Having regard to the importance of the discretion to the test in s 62, given the otherwise low bar, I am of the view that this Court should intervene. This is particularly so in the context of the history of this case. That is not to pre-empt any future decision. It is simply to say that it is a matter the plaintiff was entitled to have properly considered.

Accordingly, his honour set aside the delegate's decision and he remitted the matter to the President of the PIC for redetermination.

PIC - Presidential Decisions

Procedural fairness – onus of proof – inferences drawn – discussion of Jones v Dunkel [1959] HCA 8 – adequacy of reasons – Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 applied

Fairfield City Council v McCall [20220 NSWPICPD 15 – Acting Deputy President Parker SC – 29/04/2022

The worker commenced employment with the appellant in 1985. From 1985 to 1989 he was a garbage bin collector, but from 1989 he worked almost exclusively as a garbage truck driver. From 2004, he drove a one-man garbage truck, during which he was constantly jarred, jolted as well as twisting, turning and he regularly climbed in and out of the truck. Three times per day he emptied the truck at Lucas Heights, which had an unsealed surface, and this involved more heavy jolting and jarring. In 1994, he injured his low back and suffered PTSD as a result of a MVA and he had a number of months off work.

The worker complained of further episodes of low back pain in about 1995, but he continued to work until March 2018, when he suffered low back pain which radiated into his left leg and left big toe and a burning sensation at the bottom of both feet. He had a number of injections, but his back pain did not settle completely. His injury worsened in mid-2019 and he was unable to work from 24/09/2019 to 20/12/2019.

Member Wright noted that the medical evidence indicated pre-existing lumbar spondylosis, but the dispute between the parties was whether this had been aggravated by the nature and conditions of employment.

The appellant relied upon an opinion from Dr Edwards, that there was no work-related injury and the worker's symptoms were due to the pre-existing condition. However, the Member preferred the opinion of Dr Poplawski that the nature and conditions of employment resulted in a cumulative injury to the lumbar spine starting on 12/03/2018 and continuing thereafter at a lesser level with further specific aggravation on 24/09/2019. He also found that employment was the main contributing factor to the aggravation (s 4(b)(ii) *WCA*) and that the deemed date of injury was 24/090/2019 (s 16(1)(a)(i) *WCA*).

The Member made awards of weekly payments under s 36 *WCA* and s 60 expenses.

The appellant appealed and alleged that the Member erred in law: (1) in determining the matter on a basis not put by the parties; (2) in reversing the onus of [roof or failing to properly consider it; (3) in incorrectly drawing an adverse inference against it; and (4) in failing to give adequate reasons.

Acting Deputy President Parker SC determined the appeal on the papers.

Parker ADP dismissed ground (1). He noted that the appellant asserted that the date of injury was in 1994 and not in 2019 and that if the Member found to that effect, liability rested with a prior insurer of the appellant. However, the Member rejected that argument as being "*misconceived at the level of first principles*". He stated, relevantly:

> 51. In answer to the appellant's submission as recorded at [96] of the reasons, counsel for the worker raised *Stone v Stannard Brothers Launch Services Pty Limited* and *Alto Ford Pty Limited v Antaw*.

52. The Member correctly identified that the submission being made by the worker on the basis of those cases was that there "*may be more than one deemed date of injury for aggravations of a disease process after further periods of employment and further periods of incapacity*". That was the principle upon which the worker based his case against the appellant. It was for the appellant to answer that case if it could.

53. The Member's task was to determine whether or not that was the correct legal principle or whether the contrary, as advanced by the appellant at [96] of the reasons, was correct. The issue was live between the parties. It was up to the parties to advance such authorities as were relevant to that issue in support of their arguments.

54. There was no denial of procedural fairness because the appellant was given proper opportunity to ventilate and advance submissions in support of its contentions.

55. It is plain from what is said by the Member at [101]–[103] of the reasons that the Member placed reliance upon the statement of principle contained in *Stone* and *Antaw*. Thus at [103] the Member said:

> While it might be said that the decision of Hodgson JA in *Stone* related to the question of different dates deemed for the differing purposes of incapacity and impairment, in my view it also shows that what must be considered is the time when physical incapacity results in some loss of wages, and whether such incapacity occurs after employment has aggravated the underlying disease condition. The first step then is to consider whether there has been injury, being an aggravation of an underlying disease, including whether there has been a further aggravation as a result of further employment.

56. That disposed of the primary submission of the appellant recorded by the Member at [96] of the reasons.

57. Paragraphs [126], [128], [129] and [130] concern the method of treating Dr Loefler's reports.

58. Dr Loefler was a treating specialist. He recorded such history as was relevant to his treatment of the symptoms being complained of by the worker at the time.

59. The appellant's submission recorded in the transcript on pages 9–10 was that Dr Loefler's view was contrary or inconsistent with Dr Poplawski. The appellant submitted Dr Poplawski suggested there was a precipitating incident and that was "specifically inconsistent [with] the contemporaneous record" of Dr Loefler about there being no precipitating incident.

60. The appellant submitted further that Dr Loefler's view was not clarified by a further report, notwithstanding the respondent's solicitor had requested a further report and the Member should infer from that that Dr Loefler's further evidence would not assist the respondent.

61. The Member summarised Dr Loefler's reports. He noted that there was no precipitating incident identified and that was confirmatory of the conclusion that there was no incident or event on 12 March 2018. The interpretation and analysis of the history obtained by Dr Loefler was before the Member. It was a matter of specific submission by the solicitor representing the appellant. The Member was required to determine whether the submission should be accepted. The appellant was given the opportunity of responding to and making submissions. The Member, having addressed the submission, found against the appellant. There was no denial of procedural fairness.

62. The appellant's point concerning the absence of a further report from Dr Loefler at transcript page 11, that "*the overwhelming inference is that Dr Loefler, who's the treating specialist, does not support the [respondent] and the [respondent's] allegations in response to that correspondence otherwise we would reasonably expect it to be before you*" is addressed by the Member at [127] of the reasons:

> The [respondent] submitted that the report of Dr Loefler had not been received and no finding could be made in this regard. I accept the [respondent's] submission on the basis that the report has not been received. It is speculative in my view to infer that that the opinion of Dr Loefler would not have assisted the [respondent] in these circumstances and I decline to make the inference.
>
> 63. The principles derived from *Jones v Dunkel* depend upon there being an unexplained failure by a party to give evidence. The rule has no application if the failure is explained and, in any event, the Commission is not required to draw an inference…

Parker ADP stated that the rule in *Jones v Dunkel* operates where a party is required to explain or contradict something. He noted that the Member observed that the worker had seen Dr Foo at the request of his employer but there was no evidence before him and that the worker argued that an inference should be drawn that the evidence or report of Dr Foo would not have assisted the appellant. He stated that the missing evidence of Dr Foo called for an explanation by the appellant, which could have been as simple as the explanation given in relation to Dr Loefler's absent report, but no explanation was given. The Member was entitled to infer as he did.

Parker ADP stated that there was no denial of procedural fairness merely because the Member rejected the evidence of a witness (Dr Edwards) on the basis that his ultimate findings of fact did not accord with the assumptions made by the doctor for the purpose of the report and it is trite that if the history assumed by the expert is not made out the report is of no value.

Parker ADP rejected ground (2) and stated that a cursory examination of the matters specifically referred to by the appellant shows that on the occasions that it identified, the onus of proof was not in issue and was not reversed.

Parker ADP rejected ground (3) and described the criticism of the Member as misconceived. He stated:

> 108. In *Portelli v Tabriska Pty Limited & Ors*, Allsop P (as his Honour then was) explained the rule at [53]-[55]. His Honour said:
>
> > 53. *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 was called in aid by the appellant in support of the proposition that the primary judge erred in not drawing an inference from the failure to call Messrs Ranger and Kay … Two points should be noted about this proposition. First, it treated the circumstances as such as to require the primary judge to call in aid the 'rule in *Jones v Dunkel*'. Secondly, the inference said to be available, when that rule was applied, was one which founded a positive conclusion, contrary to the other evidence, that the group was apparently threatening or belligerent.
> >
> > 54. As to the first point, it has been pointed out on many occasions that it is a matter for the fact finder – jury or judge – as to whether the relevant inference should be drawn: *Manly Council v Byrne* [2004] NSWCA 123 at [52]; *De Groot v The Nominal Defendant* [2005] NSWCA 61 at [149]; *NSW Bar Association v Meakes* [2006] NSWCA 340 at [77]. The inferences licensed by Jones v Dunkel are drawn, if they are to be drawn, once all the evidence is in: *Manly Council* at [54].
> >
> > 55. As to the second point, the law in Australia is settled and clear that the failure to call some witness or lead other evidence does not entitle a positive inference unfavourable to the party to be drawn either in the absence of other facts capable of supporting that evidence or contrary to a competing inference available from proven facts. The use that can be made of the absent evidence is (a) an inference that it would not have helped the party's case and/or (b) it makes more readily acceptable the drawing of inferences otherwise available and relevantly unfavourable to the party not leading the evidence …

Parker ADP noted that the Member quoted a passage from *Manly Council v Byrne*, which accords with the correct understanding of the rule, and held as a fact, which was not challenged on appeal, that the worker was sent to Dr Foo by the appellant. The Member that there was no explanation forthcoming from the appellant as to why there was no evidence in the form of a report or otherwise from Dr Foo.

The Member correctly rejected the appellant's submissions that Dr Foo was not in his employ and that the worker could have asked for his opinion. He stated, relevantly:

> 112. In *Brandi v Mingot*, Gibbs ACJ, Stephen, Mason and Aickin JJ said this:
>
> > Two further comments may be made on this matter. The first is that the foundation of the inference that the absence witness 'would not have helped the party's case' is that the party or his advisers are presumed to know the content of the absent witness's evidence, otherwise he would not be a witness whom 'that party might reasonably be expected to call'. A party may thus reasonably be expected to call his own medical advisers, <u>but no such expectation could arise as to medical practitioners who examined him on behalf of other persons and whose reports may not have been available to the party</u> … (emphasis added).

Parker ADP held that Dr Foo's evidence was available to the appellant, as it commissioned the examination for the purpose of causing the worker to return to work, and it was presumed to know what that evidence would have established. The available inference that Dr Foo's evidence would not have assisted the appellant's case was available in the absence of an explanation for why the evidence was not before the Commission. No error by the Member is established. Parker ADP stated:

> 115. Nor is the appellant's complaint that the drawing of the inference by the Member denied it procedural fairness. The Member recorded at [132] that the worker submitted that an adverse inference should be drawn. This meant that the issue was live before the Member and that the appellant had an opportunity to offer evidence and submissions in rebuttal.
>
> 116. The obvious piece of evidence which could have been offered was that no report was available. The appellant offered no explanation for why there was no evidence from Dr Foo. The respondent submitted that an inference adverse to the appellant's case should be drawn. It was a matter for the Member whether or not such an inference was drawn, having concluded that it was appropriate to draw the inference, no error is demonstrated in the circumstances.

Parker ADP rejected ground (4) and he stated that there is a lack of specificity about what conclusions were reached without adequate reasons in support. He found that the Member's reasons were adequate to explain the reasoning process sand the conclusions reached. He stated:

> 135. In *Beale v Government Insurance Office of NSW*, Meagher JA said:
>
> > … reasons need not necessary be lengthy or elaborate … However there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence … Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
> >
> > Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached …
> >
> > Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.
> >
> > Whilst it is desirable to address these elements in giving reasons for a decision, it is the purpose which the reasons serve which assumes primary importance in determining the content of the reasons. That purpose must be weighed against other considerations … In the end, the balancing act which needs to be undertaken in considering the sufficiency of a statement of reasons involves the adopting of, at the least, a minimum standard which places the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal.

136. In *Mifsud v Campbell*, Samuels JA (agreed to by Clarke JA) said:

> … it is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case.
>
> Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her.

Accordingly, Parker ADP confirmed the COD.